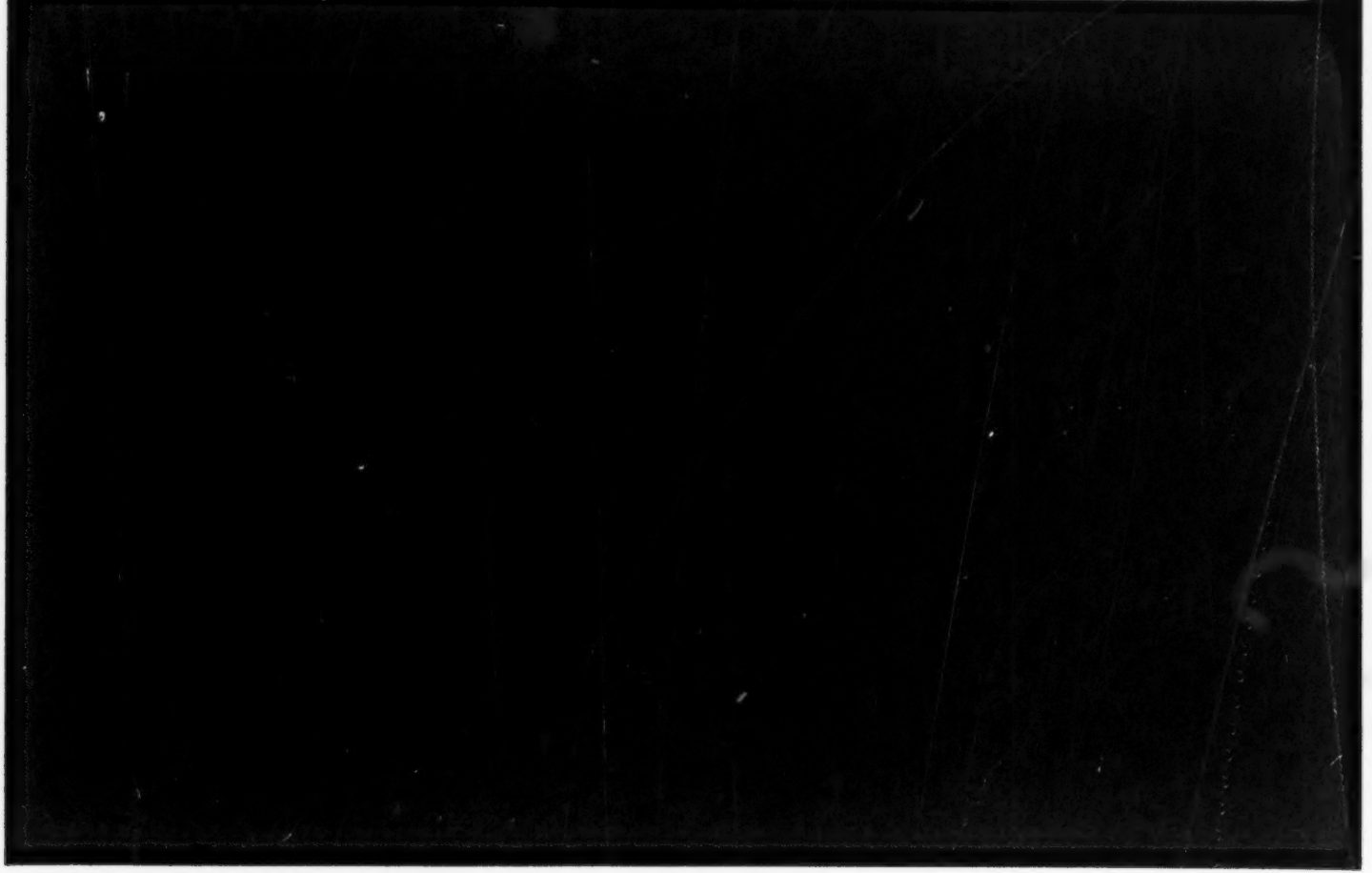

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1110

MAE HUFFMAN, PETITIONER

v.

HOME OWNERS' LOAN CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 313–317) is reported in 39 F. Supp. 139. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 335–343) is reported in 124 F. (2d) 684.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 13, 1942 (R. 343–344). A petition for rehearing was filed on January 28, 1942 (R. 345–356) and denied on February 2, 1942 (R. 357). The petition for a writ of cer-

tiorari was filed on April 4, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent leased a dwelling house in Kansas City, Missouri, to petitioner's employer. Petitioner, while employed on the premises, tripped on a defective tread of the cellar stairs, sustained injuries, and sued respondent in tort for damages. Respondent's agents had repaired the bottom landing of the stairway, and had inspected the remainder of the dwelling to determine whether other repairs were necessary, but had not attempted to repair the defect in the tread which caused the fall. The question is whether, in these circumstances, a landlord may be liable in tort, under Missouri law, to his tenant or the tenant's invitees.

STATEMENT

Petitioner, a Missouri citizen, brought this action in the District Court for the Western District of Missouri, under Judicial Code, sec. 24 (1), 28 U. S. C. sec. 41, and the Act of February 13, 1925, ch. 229, sec. 12, 43 Stat. 936, 941, 28 U. S. C. sec. 42,[1]

[1] Act of February 13, 1925, sec. 12, 28 U. S. C. sec. 42, provides as follows:

"No district court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress. This

to recover damages incurred as a result of respondent's alleged negligence (R. 1–4). Jury trial was waived (R. 11), and a trial was had before the District Court, who gave judgment for petitioner in the sum of $20,000 (R. 7–8, 317). On appeal, the Circuit Court of Appeals reversed (R. 336–343).

The material facts are undisputed. Respondent, a wholly owned Government corporation,[2] leased a dwelling house in Kansas City, Missouri, which it had acquired through foreclosure, to one Sweeney for use partly as a dwelling and partly as a beauty parlor (R. 307). Prior to the negotiations with Sweeney, respondent employed an experienced carpenter, Butterworth, to examine the premises and thereafter showed Sweeney the carpenter's written specifications as to the repairs necessary (R. 113–115, 310, 338). The only repair of the basement stairs suggested in the report was of the landing (R. 141, 246). After the execution of the lease, respondent employed a con-

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section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock."

[2] Respondent was created by the Federal Home Loan Bank Board pursuant to the Act of June 13, 1933, c. 64, sec. 4 (a), 48 Stat. 128, 129, 12 U. S. C. sec. 1463. It is "an instrumentality of the United States" which has the "authority to sue and to be sued in any court of competent jurisdiction, Federal or State." Sec. 4 (a).

tractor to make the particular repairs set forth in the specifications (R. 235–247) and the landing of the basement stairs was repaired accordingly (R. 249, 310). Respondent also employed an inspector, King, to see that the contractor made the repairs in accordance with the specifications (R. 170–171, 179) and, perhaps, to report any other defects or unsafe conditions which he might discover (R. 170, 179–180, 183–185). The inspector did not report any defect or condition such as caused the accident here in the basement stairway (R. 170–186) and respondent never attempted to make any repairs of these stairs other than of the landing (R. 310). Petitioner, who was employed as a beauty operator by Sweeney's wife, descended the cellar stairs in order to secure some materials for use in her work, and fell headlong down the stairs when a defective tread gave way under her weight (R. 308, 313). This tread had long had a seasonal lengthwise crack, and was not securely fastened down, although it was not loose (R. 1, 307, 342).

There was also evidence that respondent's representatives told Sweeney that respondent would put the "house" or "place" in "safe" or "rentable" condition (R. 189, 193, 302–303), and that respondent's inspector, King, knew that a nail protruded from the tread without connecting to the stringer to which it should have been secured (R. 174). There was no evidence that respondent

specifically agreed to repair any part of the basement stairs other than the landing.

The District Court found that respondent agreed to "repair and put said premises, including the flight of wooden steps leading from the first floor to the basement of said premises, in reasonably safe condition for use and occupancy" (R. 307, 315), that respondent inspected the steps of the stairway to determine whether there were any defective and dangerous conditions therein and knew or should have known of the dangerous condition of the tread in question (R. 315, 317), that the only repair made by respondent was in the landing at the bottom of the stairs (R. 310), and that respondent was negligent in failing to repair the defective tread (R. 309, 315).[3] On the basis of these findings the District Court held that, under Missouri law, petitioner was entitled to recover.

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[3] The District Court also found that the respondent "undertook and attempted" to repair the "steps leading from the first floor to the basement" (R. 307). The uncontradicted testimony of the respondent's Inspector King, however, shows that apart from making the repairs set forth in the specifications the only action affirmatively taken by respondent with respect to any other possible defects was to cause an inspection to be made (R. 179–180, 170), and it is clear from the opinion of the District Court (R. 315) that the court did not intend to find to the contrary. The District Court's opinion rests wholly on the failure of the carpenter, Butterworth, who originally examined the premises, to discover the defect in the tread (R. 315), while petitioner stresses the asserted negligence of King, who inspected the contractor's repairs (Pet. p. 9, 12).

In reversing the judgment of the District Court, the Circuit Court of Appeals held that, under Missouri law, the respondent was liable in tort only for injuries caused by "its active and direct negligence" (R. 339), that negligence in making an inspection afforded no basis for liability (R. 339) and that, since the respondent "undertook and attempted" to repair only the landing at the bottom of the basement stairs, the respondent was not responsible for any injuries incurred as a result of the defect in the tread in question (R. 338–341). The court below further concluded that there was no substantial evidence to support the finding of the District Court that the respondent had agreed to repair the stairway, other than the landing, or the finding that it had been negligent in failing to do so (R. 341–343).

ARGUMENT

No question has been raised by any of the parties or by the courts below as to whether the law of Missouri should be applied; the parties have assumed that it should, and the courts below have attempted to apply it. Accordingly, the ultimate question is simply whether the court below has correctly interpreted the relevant Missouri decisions. We submit that the court below has done so, and that the question does not call for further review by this Court.

On the undisputed facts of this case, respondent is not liable in tort as a matter of Missouri law.[4] It is well settled in Missouri that a landlord is not liable in tort, either to his tenant or to the tenant's invitee, for failing to carry out a covenant to repair. *Lahtinen* v. *Continental Bldg. Co.,* 339 Mo. 438, 448–449; *Kohnle* v. *Paxton,* 268 Mo. 463; *Norris* v. *Walker,* 232 Mo. App. 645, 651; *Logsdon* v. *Central Development Assn. Inc.,* 233 Mo. App. 499, 505–506; *Davis* v. *Cities Service Oil Co.,* 131 S. W. (2d) 865, 870 (Ct. App.). The landlord incurs liability only when he actually undertakes and attempts to repair, and is negligent either in making the repairs attempted to be made or in failing adequately to repair that part of the premises which he actually sets about to remedy. *Lasky* v. *Rudman,* 337 Mo. 555, 558, 560; *Shaw* v. *Butterworth,* 327 Mo. 622, 628; *Logsdon* v. *Central Development Assn. Inc., supra,* at 506; *Vollrath* v. *Stevens,* 199 Mo. App. 5, 9; *Kennedy* v. *Bressmer,* 154 S. W. (2d) 401, 406 (Ct. App.). This is so whether the repairs are undertaken pursuant to agreement or gratuitously. *Lahtinen* v. *Continental Bldg. Co.,* 339 Mo. 438, 447 (*en banc*).

[4] Plaintiff's action sounds in tort and not in contract (Pet. p. 8, n. 4) presumably because in an action for breach of a covenant to repair no recovery may be had for personal injuries. *Norris* v. *Walker,* 232 Mo. App. 645, 651; *Marcheck* v. *Klute,* 133 Mo. App. 280, 292.

Significance is attached only to what is done, not to what is promised.[5]

Here, it is undisputed that the only repair made by the respondent was in the landing at the bottom of the stairs (R. 310), and there is no evidence that it ever repaired or attempted to repair any other part of the stairway. Respondent, it is true, made an inspection of the premises, including all of the basement stairway, but it is undisputed that the inspector employed for this purpose never reported any defect in the tread in question and that the respondent never attempted

[5] In *Lasky* v. *Rudman*, *supra*, upon which petitioner relies (Pet. 7, 14, 15, 18, 19), the landlord's agents had actually attempted to repair the very porch railing which gave way, and the decision clearly rests upon that fact. Similarly, in *Shaw* v. *Butterworth*, the very screen which fell had been negligently installed by the landlord. In *Kennedy* v. *Bressmer*, the St. Louis Court of Appeals pointed out that "In our case defendant had undertaken to repair the very post which gave way and caused plaintiff to fall" (p. 406). And in *Logsdon* v. *Central Development Assn. Inc.*, where a landlord who had repaired a leaking faucet was absolved from liability for injuries caused by the broken porcelain handle of the same faucet, the Kansas City Court of Appeals remarked that "this rule creating liability does not extend so as to relate to the part of the premises that the landlord did not attempt to repair unless affected thereby" (p. 506). Cf. *Byers* v. *Essex Investment Co.*, 281 Mo. 375. There is a conflict in the Missouri decisions as to whether a landlord who undertakes a repair is liable if his negligence in making the repair does not increase the danger to the tenant. Compare *Davis* v. *Cities Service Oil Co.*, 131 S. W. (2d) 865, with *Kennedy* v. *Bressmer*, 154 S. W. (2d) 401.

to repair this tread. The court below concluded that such inspection did not amount to an undertaking or attempt to make repairs within the meaning of the Missouri decisions. Petitioner has pointed to no Missouri decision and we have found none which suggests that negligence in such inspection without more affords any basis for imposing liability on the landlord. And the cases cited above would seem to require the contrary conclusion. The decision below is therefore in harmony with the applicable local law.

CONCLUSION

The decision below is correct, is in accord with the applicable Missouri law, and presents no question of importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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